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Committee Secretary
Joint Standing Committee on Migration
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Sir/Madam

Submission to the Inquiry into immigration detention in Australia

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a non-government organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

CCL appreciates the opportunity to make a submission to this Inquiry. This inquiry into immigration detention in Australia potentially provides an avenue for improving the conditions of our detention system, and bring them more in line with standards of international law and human dignity. The international community and the United Nations have published and signed many treaties and conventions that touch upon the detention of immigrants, and Australia has yet to fully comply with its obligations under international standards.

However, CCL is concerned that this inquiry is on the one hand unnecessary – the human rights abuses inherent in the previous government's policies concerning immigration detention are so well known in the community that we should not need a parliamentary inquiry to ascertain better policy settings – and on the other hand inadequate to build overwhelming community support for permanent change in law and policy.

The human rights abuses in immigration detention arose not only because of the conditions in immigration detention centres, but through a systematic denial of access to justice and the rule of law to asylum seekers, in combination with the lack of a system for the effective protection of human rights in Australia. The system failed at both a legal and a policy level. Both areas must be addressed.

It must be acknowledged that the failure of the system was not accidental. It was deliberate policy to "send a message" to potential asylum seekers that Australia was a place where they were guaranteed to be treated unfairly.

Accordingly, achievement of satisfactory reforms to the system of immigration detention requires a recognition that it is not an acceptable or appropriate policy position to use immigration detention as part of a system which sends a "message" of deterrence to potential asylum seekers.

At this level, CCL recognises that it may be necessary to build a greater community consensus for the recognition of fundamental policy positions such as respect for human rights, adherence to the rule of law and adequate provision for access to justice. If so, then we need an inquiry on the scale of the inquiry that led to the Bringing them Home report on the stolen generations. CCL is concerned that this inquiry is unlikely to lead to a report with such profound consequences. However, the treatment of asylum seekers over the last decade or more merits a profound inquiry and would likely to be effective in ensuring long term support for a fair and proper system.

THE CURRENT SITUATION AND ITS FLAWS

The legal framework

Fundamentally, mandatory immigration detention is a violation of human rights principles. The primary flaw with the current situation is the legislated requirement for immigration detention to occur, and the limited ways in which an asylum seeker can avoid such an outcome.

This flaw is compounded by the conditions of detention.

Immigrant detention and prison

All too often, detention centres are seen and operated as though they were prisons. This is a harmful and dangerous equivalence that does violence to human rights standards in Australia and to the people detained by the state.

Detention centres are not meant to be places of imprisonment, and the conditions of detention facilities should not be equivalent to those of criminal facilities. It is true that the prison system and the immigrant detention system do not have identical modes of operation, but for detainees who have been held for extended periods of time, the distinctions fade away. Being held without charge and without any means of freeing oneself is a prison, even if the government calls it something else. The purpose of prison is to punish and detain members of society who have committed crimes and to protect the rest of society from the threat of future harm. Under those circumstances, it may be appropriate to limit visitation and communication. Immigrant detention is a fundamentally different type of detention. It exists in order to facilitate the bureaucratic need to know where questionable immigrants are in order to process and possibly deport them. It is not intended to punish, nor should it be, and the facilities should reflect this underlying distinction.

Indeterminacy of detention

In a very important way, detention centres are more worrying and harmful than jails, and this is due to the indeterminacy of mandatory detention. When a criminal is arrested and charged with a crime, there is a known procedure that involves various deadlines and sentences. Although confined, the prisoner has a sense of his future and knows where he fits into the system. An immigration detainee receives none of these basic psychological assurances and is left afloat, thrown into a detention centre to wait for an undetermined amount of time until one day they are either granted a visa or deported. The starkest cases of such indeterminacy lead to absurdly

and harmfully long lengths of detention; the famous case of Peter Qasim, who was held in detention for 7 years, is illustrative of such harm. His 7 years of forced detention were in substance nothing more than prison without a trial and resulted in severe psychological harm. The lack of legal guarantees against such harmful situations needs to be addressed.

The Rudd government has done away with the harmful Temporary Protection Visas (TPV), but the legal framework for the Howard government detention system is still largely in place. The legal framework displays a strong bias against access to justice and rule of law in relation to asylum seekers. Wholesale amendment of the *Migration Act 1958* is required to alter this. Unacceptable aspects of the legal framework include arbitrary time limits which cannot be varied regardless of whether or not there are good reasons to do so in the circumstances of a particular case.

Arbitrary time limits also have illogical consequences in terms of entitlement to bridging visas on reasonable terms. For example, if asylum seekers have not applied for a protection visa within 45 days of arrival, they are denied proper medical access, as well as education and housing. There is no reason for this policy other than to appeal to the base draconian impulses of the community to inflict punishment on strangers. There is an urgent requirement to re-legislate to ensure that humans rights protections are introduced to protect asylum seekers from such base impulses.

Wrongful detention has been a serious problem, and a natural result of the policies which deny access to justice and rule of law from the migration regime. The introduction of access to justice and rule of law principles should lead to a cultural shift within the Department of Immigration and Citizenship which will require respect and fair consideration of claims for protection.

Access to visitation and communication while in detention

Visitation should be more open and free to immigrants being held in detention. In prison, convicted criminals are being kept away from society both for their own protection and for the protection of others, and it thus may be appropriate to place limitations on the visitation rights of those who wish to see them. Immigration detention is fundamentally different, and these restrictions should not be applied to visitors. The purpose of mandatory detention for immigrants is basically a bureaucrat purpose; we need to keep immigrants in a central location in order to process and deport them as well as ensure they don't escape back into society to hide. There is nothing in this reasoning that would lead to a restriction on visitation. While detainees are being kept confined in a stable location for processing purposes, visitor access should not be restricted to anything other than basic security checks. As long as there is no physical danger posed to anyone present, there is no reason to restrict visitation to a detainee.

Communication to the outside world should also be made as free to detainees as possible. The purpose of detention being centralisation and retention of access to detained individuals, there is no reason any detained immigrant or refugee should be denied access to basic tools of communication such as faxes, telephones, or the internet. We note this government has made significant improvements in this regard. We consider that these improvements should be enshrined in legislation.

HOW TO APPROACH THE PROBLEM

Rights of Asylum Seekers and Refugee

The UN document, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereafter "The Body of Principles"), outlines the rights of refugees and asylum seekers. This document is 20 years old and is established in international law.

Principle 13 states that 'any person shall at the moment of arrest and at the commencement of detention and imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention, or imprisonment, respectively with information on and an explanation of how to avail himself of these rights'.

This requirement is not met by the detention system in Australia. Far too often detainees are left without adequate legal advice and without any knowledge of how to proceed in their efforts to free themselves. There are avenues of appeal for detainees under the *Migration Act 1958*, but without adequate access to information, advice and representation, detainees, many of whom are not able to speak freely in English, are left without a place to turn. They rely on the assistance of charitable institutions and common gossip to figure out how to proceed with their case, all the while being detained in a confined area for an indeterminate future.

Principle 17 provides that a detainee is entitled to legal counsel and 'shall be informed of his right by the competent authority promptly after his arrest'. The *Migration Act 1958* violates this principle. Section 193 of the act removes the obligation on the part of the Commonwealth to inform detainees of their legal rights if they have not successfully cleared immigration formalities. It is established practice to not advise asylum seekers of their right to a lawyer or of their right to apply for protection.

The *Migration Act* also has multiple sections that allow for special appeals to the Minister in the face of a failed Refugee Review Tribunal decision; section 48 allows for an appeal to reconsider refugee status and section 417 allows for an appeal on humanitarian grounds alone. The problems with this style of approach are well known. The approach leaves open the application of guidelines which effectively prevent the application of these provisions in meritorious cases. The Minister is left to make an inappropriately large number of decisions personally. Experience has shown that a very large number of cases which are reconsidered after the Minister has allowed them to be, result in favourable outcomes for the applicant. It is unsatisfactory that the performance of Australia's international humanitarian obligations is so largely left to the discretion of the Minister.

Detainees are often not informed of these appeals and are unaware of the opportunity unless and until they are told about it by a volunteer aid worker or another detainee. There is often a rush against the clock to make sure that these appeals can be made before deportation. Because deportation is often sudden and unannounced, there is no way of knowing when it will happen and thus it is very hard to plan an appeal. These pathways to potential solutions must be made more explicit and arranged in a more formal and timely manner for them to be effective.

Mandatory Detention as a Violation of Human Rights and the ICCPR

Australia's mandatory detention policy is unnecessarily harsh and has been cited many times by the UN Human Rights Committee for violating international human rights standards. The process of mandatory detention specifically violates the *International Covenant on Civil and Political Rights* ("the ICCPR") in the following ways:

- it amounts to arbitrary detention (contrary to article 9(1)) ;
- it is not subject to substantive judicial review (contrary to article 9(4));
- it amounts to an arbitrary interference with the family (contrary to articles 17(1) and 23(1));
- it fails to afford children the protection of the state (contrary to article 24(1));
- it amounts to cruel, inhuman or degrading treatment (contrary to article 7); and,
- it fails to treat detained people with humanity and with respect for their inherent dignity (contrary to article 10(1)).

These violations are both unjust and unnecessary. Among the world's democratic nations, Australia rates poorly with its fellow countries in terms of refugee acceptance and treatment. The methods implemented in this country have been justified in terms of necessity and security, but looking at examples from other nations shines a light on that fallacy.

While the present government has significantly reduced the number of cases in which human rights abuses are continuing to occur, the legal system which allowed the abuses to occure remains largely in place.

Australia requires effective protection of human rights which prevents violations of this kind occurring.

Lessons from other nations

Canada, for example, specifies that detention of asylum seekers, and especially of children, should be 'rare' and only used as an exceptional measure. The Immigration and Refugee Board states that if people are detained, their cases should be reviewed within 48 hours by an independent adjudicator and reviewed again periodically. This stands in stark contrast to the Australian approach, which has indefinite time periods for detention and no guarantees of a quick and speedy resolution.

In other countries, detention facilities are open and the detainees are not confined. Germany, for example, uses this policy, as does Denmark, whose facilities are in fact run by the Red Cross. In Britain, where there are over 100,000 individuals seeking asylum, only about 1,000 are kept in detention – far less than one percent. This freedom is even more striking when you consider the proportion of asylum seekers to the population in Britain is over three times as high as in Australia.

An apt comparison, one that Australia can learn from, is the Swedish model. Sweden and Australia receive a similar number of asylum seekers, but approach the matter from very different perspective. The Swedish policy of detention includes the following:

- The four Swedish centres have a capacity of only 120 persons;
- Children may not be detained for more than 6 days;
- Detention centres are open to the media and to charitable welfare organizations;
- The law requires that legal rights should be explained to asylum seekers;
- Detainees are allowed to have full communication access, such as cell phones and mail;
- No long-term detention, but rather a supervised community accommodation system with regularly scheduled check-ins

This system, if moved towards in Australia, would greatly increase the human rights standards applied in our immigration detention system. The need to oversee and control the flow of immigrants cannot possibly come at the expense of basic human rights.

If these other countries are able to run an efficient refugee and asylum system without the undue harshness of mandatory detention, there is no reason Australia needs to follow its current course.

Treatment of Children in Detention

Australia is a signatory to the Convention on the Rights of the Child. Unfortunately, there is considerable evidence that the condition of children in detention has not met the standards of that Convention. The rules laid down by the Department of Immigration and Multicultural Affairs specify that detained individuals must be treated with "respect and dignity", and that education of children is a basic right that cannot be denied. In the years that Australia has had a mandatory detention policy, however, there have been numerous accounts from former detainees, journalists, and official visitors that testify to gross violations of basic human dignity.

Solutions

The inquiry requests solutions to the myriad problems that face the detention system, and it is of the utmost importance that the reforms made to the system are commensurate with human rights standards.

Mandatory detention is arbitrary and must be abandoned. Australia's persistence in this unjust practice is contrary to the development of international law and custom. There are many other ways to deal with immigrants that do not violate fundamental human rights but at the same time provide protection to the population at large. These possibilities include, but are not limited to:

- Reform of the *Migration Act 1958* so as to provide generally for the rule of law, access to justice and protection for human rights, and to ensure that immigration detention is only used in appropriate cases;
- A maximum length of detention, over which a detainee must be released from confinement;
- A formal method of community placement where the responsibility to monitor and care for the immigrant is shared by the community and the state jointly;
- A system of regular check-in and inspection to maintain communication with the immigrant;
- Abolishment of the detention of children beyond the initial processing;
- Special consideration can be made for people who are either a danger to themselves or others;
- A charter of rights to ensure that dealing with asylum seekers is in accordance with human rights standards which Australia has in principle accepted but in practice not adhered to.

The conditions in detention must be changed so as to be consistent with the fundamental purposes of immigrant detention. This means free visitation for all detainees, unimpeded access to various forms of communication, adequate living conditions, and access to standard medical care for all physical or psychological needs. The conditions of detention should be

limited to the goal of keeping detained individuals in a centralised area so as to facilitate processing; any attempt to go beyond those necessary constraints is the equivalence of punishment, which is to be reserved for criminals and not immigrants.

As set out above, it is desirable that there be overwhelming community support for a system which permanently requires adherence to human rights principles, including the rule of law and access to justice. For this reason, we consider the Committee should consider recommending an inquiry which enables the stories of human rights abuses to be properly documented and permanently recorded.

OPCAT

Aside from making internal reforms to the detention system, Australia must join the international community in preventing any and all forms of human rights violations in places of detention. On 1 July 2008, the NSWCCL in conjunction with the Law Society submitted a recommendation to the government in favour of ratifying the United Nations Optional Protocol on the Convention Against Torture ("the OPCAT"). The OPCAT would require vigilance against torture and inhumane or degrading treatment of detainees and prisoners. It accomplishes this by (1) allowing international inspectors to enter the country and inspect any and all facilities and locations where people are detained and (2) setting up National Preventative Mechanisms (NPMs) who are tasked with oversight of detention facilities and continuous inspection. This two-pronged system is meant to ensure that all areas of detention are up to international standard of human rights and protect all detained individuals against violations of those rights.

Immigrant detention is included in the purview of the OPCAT, and it is in the best interest of the Australian people to ratify that treaty. There have been many violations of human rights abuses in immigrant detention facilities over the years, ranging from substandard living conditions for children to inadequate medical care. The treatment of immigrant detainees must be commensurate with international standards, and the ratification of the OPCAT is essential to improving the processing of refugees and asylum seekers in Australia.

CONCLUSION

We would be happy to elaborate on any of the issues dealt with in this submission should the Committee wish us to do so.

Yours faithfully

NSW Council for Civil Liberties
Stephen Blanks, Secretary